90-1148

Supreme Court, U.S.
FILED
JAN 16 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1990

ROY RODGERS, as Sheriff
of Gilchrist County, Florida,

Petitioner,

vs.

MARCIA J. HUFFORD, ET AL.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. THE STATE OF FLORIDA HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY FOR ITSELF, ITS AGENCIES AND SUBDIVISIONS AND ITS OFFICERS IN THEIR OFFICIAL CAPACITIES. SHERIFF RODGERS IN THE CASE AT BAR WAS ACTING AS A STATE OFFICER AND THEREFORE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

II. THE ELEVENTH CIRCUIT'S OPINION HOLDS THAT MERE NEGLIGENCE OR INADEQUACY IN TRAINING OF SUBORDINATES IS SUFFICIENT TO CREATE A FEDERAL CAUSE OF ACTION UNDER 42 U.S.C. §1983, IN CLEAR AND IRRECONCILABLE CONFLICT WITH SEVERAL PRIOR DECISIONS OF THIS COURT.

LIST OF PARTIES

The parties to this action are: Roy Rodgers, former Sheriff of Gilchrist County, Florida and the Estate of Thomas Holt, Petitioners/Defendants, and Marcia J. Hufford, Richard A. Hufford and Joshua James Penticoff, a minor, by and through his mother and next friend, Marcia J. Hufford, Respondents/Plaintiffs.

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OPINIONS BELOW

The Final Judgment of the United States District Court for the Northern District of Florida in favor of Respondents and against Petitioner in the total amount of $157,500.00 entered on November 4, 1988 is set out in the Appendix at page 1. The opinion of the Court of Appeals affirming the Judgment and entered on September 25, 1990 is found as *Hufford v. Rodgers*, 912 F.2d 1338 (11th Cir. 1990) and is reproduced in the Appendix at page 2. The Order denying rehearing and rehearing en banc was entered on December 12, 1990 and is reproduced in the Appendix at page 7.

JURISDICTION

The Judgment of the Court of Appeals for the Eleventh Circuit was entered on September 25, 1990. A timely Petition for Rehearing was filed and the Order of the Court of Appeals denying the Petition for Rehearing was entered on December 12, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1) and 2101(c).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 42 U.S.C. §1983 which reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subject, or causes to be subject, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS IN THE COURT BELOW

This action began with the filing of a Complaint on October 23, 1985. (R1-1) Defendants filed a Motion to Dismiss on December 5, 1985 (R1-5) which was denied by Order dated January 10, 1986. (R1-9)

Defendants filed their Answer and Affirmative Defenses on January 27, 1986. (R1-10) On August 13, 1986 Defendants filed their Motion for Summary Judgment based partially on their claim that the state of Florida had not waived its Eleventh Amendment immunity for its officials in their official capacities. (R1-17) That Motion was denied by Order dated February 24, 1987. (R1-34)

During the pendency of this action Defendant Deputy Thomas Holt died and on April 21, 1987 a Suggestion of Death was filed on the record. (R1-39) Defendant Holt's estate was substituted as a party Defendant and filed an Answer on May 17, 1988. (R1-51)

Following discovery, the case came to trial before a jury in Gainesville, Florida beginning on October 31, 1988 and on November 2, 1988, the Court having denied defense Motions for a directed verdict, the jury returned a verdict in favor of Plaintiffs. (R2-76) A Judgment on the

verdict was entered on November 4, 1988. (R2-77) Defense Motions for Judgment in accordance with their Motion for Directed Verdict or, in the alternative, for a new trial, were filed on November 14, 1988 (R2-79) and denied by Order dated November 29, 1988. (R2-82) This appeal followed.

B. STATEMENT OF THE FACTS

On April 22, 1980, the Circuit Court of Leon County, Florida entered a Final Judgment of Dissolution of Marriage in the Marriage of Dennis Lee Penticoff and Marcia J. Penticoff, now Marcia J. Hufford, Plaintiff herein. The Final Judgment incorporated a Stipulation and Agreement outlining matters concerning the custody of the parties' minor child, Joshua James Penticoff, also a Plaintiff herein.

On or about May 1, 1980, Dennis Lee Penticoff relinquished custody of the minor child to Marcia J. Penticoff in Clearwater, Florida. Mrs. Penticoff, now Mrs. Hufford, contended that Dennis Lee Penticoff stopped visiting the child in approximately June of 1980. In any event, Marcia J. Penticoff left the parties' home in Clearwater and moved to the small town of Trenton, Florida in Gilchrist County. She contended that her former husband, Dennis Lee Penticoff, knew where she was. Dennis Lee Penticoff denied that he knew where she was and asserted that he had to hire a private detective, through whom he learned in 1981 that the Plaintiff had married Richard A. Hufford, also a Plaintiff herein, and was living in Trenton, Florida with the minor child, Joshua James Penticoff.

On October 21, 1981, Mr. Penticoff swore out an Affidavit which was filed in the Circuit Court of Leon County outlining generally the facts set forth above.

On or about October 23, 1981, Mr. Penticoff brought certain legal documents to the office of the Sheriff of Gilchrist County and presented them to Detective Bud DuBois of the Gilchrist County Sheriff's Department, who died prior to the filing of this lawsuit. Detective DuBois enlisted the assistance of Defendant Deputy Thomas Holt, who died during the pendency of this action, advising Holt that he had legal documents calling for surrender of the minor child to his natural father, Dennis Lee Penticoff. Deputies DuBois and Holt went to the Hufford's home where the late Bud DuBois showed the papers to the Plaintiff and her husband. They peacefully took custody of Joshua James Penticoff and turned him over to his natural father. Both of the Plaintiffs, Marcia Hufford and Richard Hufford, contended that they were intimidated into releasing the child because the two Deputies were in uniform, wearing badges and carrying sidearms.

The natural father, Dennis Lee Penticoff, apparently took the child out of the state of Florida and moved to Texas and Mrs. Penticoff preferred criminal charges against him for taking the child out of the state of Florida. Prior to the trial of this action the child had been located and further proceedings had been held in Circuit Court in Trenton, Florida as a result of which Mrs. Hufford and her former husband, Dennis Lee Penticoff, had agreed on an arrangement for custody and visitation of the minor child.

At all times pertinent to this action the Defendant Roy Rodgers was the Sheriff of Gilchrist County but he had no personal knowledge of the incident until after it had occurred. It was his contention that he neither directed the actions of his Deputies nor did he establish any official policy or custom which caused those actions. It was the Defendant's contention that the Deputies acted in the belief that the papers presented to them constituted a Court Order requiring them to assist Mr. Penticoff in obtaining custody of his natural child.

ARGUMENT

I. THE STATE OF FLORIDA HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY FOR ITSELF, ITS AGENCIES AND SUBDIVISIONS AND ITS OFFICERS IN THEIR OFFICIAL CAPACITIES. SHERIFF RODGERS IN THE CASE AT BAR WAS ACTING AS A STATE OFFICER AND THEREFORE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY

The panel decision in the case at bar flatly held that Florida sheriffs in their official capacities are not entitled to the benefit of Eleventh Amendment immunity.

There is no controversy over the fact that the state of Florida has not waived its Eleventh Amendment immunity for itself, its agencies and subdivisions and its officers in their official capacities. The Eleventh Circuit so held in *Gamble v. Florida Department of Health and Rehabilitative Services*, 779 F.2d 1509 (11th Cir. 1986); and the Florida Supreme Court so held in *Spooner v. Department of*

Corrections, 514 So.2d 1077 (Fla. 1987); and *Hill v. Department of Corrections*, 513 So.2d 129 (Fla. 1987). The question to be decided is whether Florida sheriffs and their deputies are state officers, so as to be entitled to Eleventh Amendment immunity.

No issue has more widely split the district courts in Florida than the application of Eleventh Amendment immunity to Florida sheriffs and their deputies. The judges of the Northern District have uniformly refused to apply Eleventh Amendment immunity to Florida sheriffs and their deputies. The judges of the Middle District have consistently granted Eleventh Amendment immunity to Florida sheriffs and their deputies. The Southern District is widely split on the issue. At least three judges have granted Eleventh Amendment immunity to Florida sheriffs and their deputies and three other judges have denied it. The Eleventh Circuit has been presented with that question in numerous cases and, until the panel decision in the case at bar, has refused to rule on the question. The one exception was the panel decision of this Court in *Hamm v. Powell*, 874 F.2d 766 (11th Cir. 1989) in which a panel consisting of Judges Hill, Anderson and Eschbach directly held that Florida sheriffs are protected by the Eleventh Amendment in their official capacities. On rehearing, *Hamm v. Powell* was vacated and the Court affirmed on other grounds, therefore mooting the Eleventh Amendment question. It should be noted that Judge Hill is also a member of the panel in the case at bar and his holding in the case at bar is directly in conflict with his holding in the earlier panel decision in *Hamm v. Powell*. The panel decision in the case at bar cites the case of *Beard v. Hambrick*, 396 So.2d 708 (Fla. 1981) for the

proposition that the Eleventh Amendment does not protect Florida sheriffs whereas the original panel decision in *Hamm v. Powell, supra,* cites the same case for the proposition that sheriffs and their deputies are *state* agents for official immunity purposes in Florida. That holding is found in footnote 3 of page 770 of the panel decision in *Hamm v. Powell.*

Conspicuous by its absence from the panel decision is any discussion or even any mention of two recent cases in which the Eleventh Circuit has applied Eleventh Amendment immunity to Alabama sheriffs and their deputies. Those cases are *Parker v. Williams,* 862 F.2d 1471 (11th Cir. 1989) and *Free v. Granger,* 887 F.2d 1552 (11th Cir. 1989).

The panel's discussion on this question is found on pages 1340 through 1342 of the opinion and the Court discusses four aspects of Florida sheriffs. Those aspects are state law, state control, funding source, and funds to satisfy judgments. Petitioner Rodgers submits that as to each of those areas Florida sheriffs are substantially identical to Alabama sheriffs to whom the Eleventh Circuit has consistently applied Eleventh Amendment immunity. Florida sheriffs and Alabama sheriffs are substantially identical in their powers and obligations pursuant to state statutes. In each state the sheriffs serve as bailiffs of the trial courts of general jurisdiction. In each state the sheriff's sole funding source is a budget allocated to him by his county commission subject to the sheriff's right to appeal his budget to members of the state cabinet. In each case the sheriff can be removed from office only by the governor. In Alabama, to remove a sheriff from office

permanently he must be impeached under the Constitution. In the state of Florida a sheriff may be removed temporarily by the Governor of the state of Florida and that removal may be made permanent by a majority vote of the Florida Senate. In each state the Sheriff is required to give a bond for the faithful performance of his duties payable to the Governor of the state. In each state the sheriff and his deputies make arrests in the name of and on behalf of the *state* of Alabama or the *state* of Florida. The *only* difference, and Petitioner submits that it is a distinction without a real legal difference, is that Alabama sheriffs are referred to in the Alabama Constitution as state officers. If a similar provision appeared in the Florida Constitution, Florida sheriffs and their Alabama counterparts would be legally and factually identical.

In both Alabama and Florida the sheriff is required by state statute to post a bond, and in Florida the bond is payable to the Governor. Alabama Statutes §36-22-1; Florida Statutes §§30.01 and 30.02. In Alabama and Florida the county has no authority to remove the sheriff. In Alabama he must be impeached. Alabama Constitution §138. In Florida he may be removed by the Governor and the removal may be made permanent by the state senate. Florida Constitution, Article IV, Section 7. In both states compensation is set by state statute to be paid from the general treasury of the county. Alabama Statutes §36-22-16; Florida Statutes §§30.48 and 30.50. In both states all fees collected by the sheriff are paid to the general fund of the county. Alabama Statutes §36-22-17; Florida Statutes §30.51. The duties of sheriffs in both states are specifically provided by statute and are substantially identical. Alabama Statutes §36-22-3; Florida

Statutes §30.15. In *Parker v. Williams, supra,* in which the Eleventh Circuit held that Alabama sheriffs are protected by the Eleventh Amendment, the Court recognizes that the county in which the sheriff is elected can still be sued directly. As the Court states in footnote 4:

> . . . To the extent this claim may be against Amerson as representative of the county, Parker will suffer no prejudice from a finding that the Eleventh Amendment bars the claim. Parker can and did sue the county directly.

862 F.2d at 1476, Footnote 4. The same is true in Florida. *Lucas v. O'Loughlin,* 831 F.2d 232 (11th Cir. 1987).

At the conclusion of its discussion of the Eleventh Amendment question, the panel cites as apparently controlling authority the earlier decisions of *Lucas v. O'Loughlin, supra,* and *Lundgren v. McDaniel,* 814 F.2d 600 (11th Cir. 1987). In *Lucas v. O'Loughlin, supra,* the Eleventh Amendment question was neither raised by any party nor discussed or even mentioned in the opinion. In *Lundgren v. McDaniel, supra,* the Court expressly declined to rule on the question by holding that:

> . . . Thus, the award of damages on the section 1983 count was against the deputies solely in their individual capacities and is not barred by the eleventh amendment.

814 F.2d at 604.

The Fourth Circuit has held that South Carolina sheriffs are agencies of the state for purposes of the Eleventh Amendment, even though the South Carolina Supreme Court had determined that a sheriff was a county officer for purposes of filling a vacancy. In *Gulledge v. Smart,* 691 F.Supp. 947 (D.S.C. 1988), the court opined as follows:

> . . . While the state constitution establishes the elective office of county sheriff and his term of office, it also provides that the General Assembly is to prescribe his duties and compensation. S.C. CONST. art. V §24. Accordingly, the General Assembly through numerous statutes has set forth the sheriff's (and his deputies') duties and compensation. *See South Carolina Code of Laws*, 1976, §§23-11-10 *et seq.*; §23-13-10; §4-9-30(5) and (7). The sheriff's arrest powers relate primarily to state offenses. *Id.* §§17-13-30, 23-15-50. Indeed, even the sheriff's territorial jurisdiction, namely, county-wide, is in effect prescribed by the legislature through the statutory designation of county boundary lines. *Id.* §§4-3-10 *et seq.* Although the sheriff as an elected official is not subject to hiring and firing by the state, the legislature has nevertheless prescribed that the Governor is the public official empowered to remove the sheriff form [sic] office for misconduct and to fill a vacancy in that office. *Id.* §1-3-240; §23-11-40. As in *McConnell*, "the inescapable conclusion is that [a county sheriff] [is] dominated by the state." 829 F.2d at 1328.

691 F.Supp. 954, 955.

The court summarizes its holding as follows:

> In sum, South Carolina's county governing bodies "have no measurable control over the appointment, discharge, . . . , duties, or policies of the [sheriff and his deputies]." *McConnell v. Adams*, 829 F.2d at 1327. The Court concludes therefore that the defendants were acting as *agents of the state* when they took (or failed to take) the actions complained of.

691 F.Supp. at 955 (Emphasis supplied).

The Fourth Circuit affirmed the district court without opinion in *Gulledge v. Smart* at 878 F.2d 379 (4th Cir. 1989).

This question is one of statewide application and profound importance to future litigation involving constitutional sheriffs in the state of Florida. This issue is presently pending in as many as forty cases in all three district courts in Florida as well as in several other cases still pending before the Eleventh Circuit Court of Appeals. It is an issue of statewide implication and statewide application and will directly affect civil rights litigation under Section 1983 against all of the constitutional sheriffs of the state of Florida. It is certainly an issue important enough to be decided by the Supreme Court of the United States.

II. THE ELEVENTH CIRCUIT'S OPINION HOLDS THAT MERE NEGLIGENCE OR INADEQUACY IN TRAINING OF SUBORDINATES IS SUFFICIENT TO CREATE A FEDERAL CAUSE OF ACTION UNDER 42 U.S.C. §1983, IN CLEAR AND IRRECONCILABLE CONFLICT WITH SEVERAL PRIOR DECISIONS OF THIS COURT

The jury found that Defendant Thomas Holt violated the Plaintiff's civil rights but did so in the good faith belief that he was acting properly and not in violation of clearly established law. The jury found that investigator Bud DuBois violated the Plaintiff's civil rights, but Investigator DuBois was not a party defendant. The jury was then allowed to answer Question No. 3 on the verdict form which read as follows:

> 3. Did the Defendant Sheriff Rodgers establish a custom or policy or was he *grossly negligent* in

> training or supervising his deputies which proximately caused the deprivation of Plaintiff's constitutional rights?
>
> YES ___ NO ___ (Emph. Suppl.)

First, as to custom or policy, Defendant's Exhibit 1 was a copy of the Sheriff's Manual for his employees. In three separate sections in that Manual it is made clear that deputies are expected to enforce and to serve enforceable orders of civil courts, including writs of assistance, writs of execution, writs of replevin, and the catch-all "Court Orders". It is likewise clear from that policy that deputies were forbidden by written policy from interfering in civil matters without a court order except to advise the parties to consult their attorneys and to take the matter before a judge. The deposition testimony of Defendant Holt is completely consistent with that policy as is indicated by the following series of questions and answers from his deposition which was read to the jury and introduced into evidence:

> Q. Sir, if someone was to present to you, this is just a hypothetical, a lawful court order indicating the hours during which they were entitled to have custody of the child and that person was to represent to you that their ex-spouse was refusing to give them that child, absent any specific directions or orders or language in the order authorizing a law enforcement officer to retrieve the child what would you do?
>
> A. I would tell them that they would have to go back to their attorney and go before the judge.
>
> Q. Okay. Any [sic] why would you tell them that, sir?

A. Because it's a civil problem and I can't get involved in it unless there is a lawful court order.

Sheriff Rodgers testified live and also in his deposition which was introduced into evidence that if the only documents the deputies had on the night of October 23, 1981 were the documents introduced into evidence as Plaintiff's Exhibit 1, then taking the child from the natural mother would have been a violation of his policies.

In addition, the following facts are absolutely undisputed in the record:

1. Both Investigator DuBois and Deputy Holt were fully qualified and certified law enforcement officers pursuant to the Florida Police Standards Law and had completed successfully all educational requirements under Florida law to be law enforcement officers.

2. Investigator DuBois was a law enforcement officer with twelve years prior experience and Deputy Holt was a law enforcement officer with six years prior experience.

3. There was no evidence whatsoever of *any* prior incidents involving either officer.

4. There was no evidence whatsoever of *any* prior incidents remotely similar to the incident which occurred on October 23, 1981 in the history of Gilchrist County, and certainly no such incidents during the tenure of Defendant Sheriff Rodgers.

The United States Supreme Court dealt with the question of whether a governmental policy could be established by evidence of a single incident in the case of

City of Oklahoma City v. Tuttle, 471 U.S. 808, 85 L.Ed.2d 791, 105 S.Ct. 2427 (1985). As the Court held in that case:

> . . . Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes *proof that it was caused by an existing, unconstitutional municipal policy*, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved. But *where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation*. Under the charge upheld by the Court of Appeals the jury could properly have imposed liability on the city based solely upon proof that it employed a nonpolicymaking officer who violated the Constitution. The decision of the Court of Appeals is accordingly reversed.

Id. at 804, 805. (Emph. Suppl.).

The above quotation is from the Plurality Opinion of Justice Rehnquist joined by Chief Justice Burger and Justices White and O'Connor. However, the principle set forth in that quotation was concurred in by seven of the nine Justices. The following is a quotation from the concurring opinion of Justice Brennan, concurred in by Justices Marshall and Blackmun:

> Thus, without some evidence of municipal policy or custom independent of the police officer's misconduct, there is no way of knowing whether the city is at fault. *To infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city*

> *liable on the basis of that policy, would amount to permitting precisely the theory of strict respondeat superior liability rejected in Monell.*

Id. at 809. (Emph. Suppl.)

The Eleventh Circuit considered the question in 1985 in the case of *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985) (en banc). *Gilmere* dealt with the shooting of Thomas E. Patillo by two Atlanta Police Officers. The Court held that the police officers had been properly held liable, but reversed the judgments as to the City of Atlanta and the supervisory officials. As the Court states in its Opinion:

> . . . We find it unnecessary at this time to state the rule to be followed by this circuit, however, as we find that plaintiff has failed to make out a case against the city even under the gross negligence standard. At most she established that the city failed to train one single policeman properly in the appropriate methods of avoiding the use of deadly force. Even if such failure could be said to be "the moving force of the constitutional violation", as required by *Monell*, see *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed.2d 509 (1981) (quoting *Monell*, 436 U.S. at 695, 98 S.Ct. at 2038), the plaintiff's proof did not in any case satisfy Monell's further requirement that the failure resulted *from a custom that was "so permanent and well settled" as to have the force of law. Monell*, 436 U.S. at 691, 98 S.Ct. at 2036.

Id. at 1504. (Emph. Suppl.)

The Court goes on to hold:

> Finally, we address plaintiff's claim against various of the police officers' supervisors, including Maynard Jackson, the mayor, Lee

> Brown, the public safety commissioner, and George Napper, the chief of police. The district court found for these defendants on the ground that the plaintiff had failed to establish the existence of an "affirmative link", as required by *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), between the death of Patillo and the action or inaction of any of the three supervisors.
>
> We agree. There is no evidence in the record that any of these defendants participated directly in the shooting of Patillo, and although Brown and Napper may have had the right to control the actions of the police officers, *they could not be held liable under section 1983 for having "the mere right to control without any control or direction having been exercised . . . ". Monell*, 436 U.S. at 694 n.58, 98 S.Ct. at 2037 n.58.

Id. at 1504. (Emph. Suppl.)

Footnote 10 from that Opinion is likewise applicable to the case at bar. It reads as follows:

> We acknowledge that various courts have concluded that a single constitutional violation by a municipal employee can suffice to establish custom or policy. See, e.g., *Turpin v. Mailet*, 619 F.2d 196, 201 (2d Cir. 1980); *Leite v. City of Providence*, 463 F.Supp. 585, 590-91 (D.R.I. 1978). This approach, however, was rejected by the Supreme Court last term in *City of Oklahoma City v. Tuttle*. Although there was no majority opinion on the municipal liability issue in *Tuttle, both the plurality and dissenting justices agreed that an isolated shooting by a police officer cannot, by itself, suffice to prove the existence of a city policy or custom*. See ___ U.S. at ___, 105 S.Ct. at 2433-37 (opinion of Rehnquist, J., joined by Burger, C.J.,

> and White and O'Connor, J.J.); 4645-46 (Brennan, J., joined by Marshall and Blackmun, J.J., concurring in the judgment).

Id. at 1504. (Emph. Suppl.).

The Southern District of Florida has followed the reasoning of *City of Oklahoma City v. Tuttle, supra,* in the case of *Cummings v. Palm Beach County,* 642 F.Supp. 248 (S.D. Fla. 1986). In that case the Court holds that:

> . . . Further, in *City of Oklahoma City v. Tuttle,* 471 U.S. 808, ___, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791 (1985), the allegation of a single act of unconstitutional conduct was deemed insufficient to support an allegation that the conduct was undertaken pursuant to an official custom or policy.

Id. at 250.

The Eleventh Circuit, in the case of *Cannon v. Taylor,* 782 F.2d 947 (11th Cir. 1986), held as follows:

> The testimony and documentary evidence reveals that Officer Taylor *received the standard police academy training on operating his vehicle* and on applicable state laws. Additionally, the state law on operating police vehicles over the speed limit was reproduced in the Columbus police manual. This Court is unwilling to say that this training procedure is so inherently inadequate as to subject the City to liability in the absence of past officer misconduct resulting from lack of training. See *Languirand v. Hayden,* 717 F.2d 220, 227-28 (5th Cir. 1983) cert. denied, 467 U.S. 1215, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984) ("a municipality is not liable under section 1983 for the negligence or gross negligence of its subordinate officials, including its chief of police, in failing to train the particular officer in question, *in the*

> *absence of evidence at least of a pattern of similar incidents in which citizens were injured or endangered by intentional or negligent police misconduct* and/or that serious incompetence of misbehavior *was general or widespread* throughout the police force"). The evidence is insufficient to show a training deficiency transgressing constitutional boundaries.

Id. at 951. (Emph. Suppl.)

The cases just cited and, especially, *Cannon v. Taylor, supra*, are directly on point. Not only was there no evidence whatsoever of a pattern of similar incidents or that serious incompetence or misbehavior was general or widespread throughout the Sheriff's Department, *but there was no evidence of any prior incidents involving any officer of the Gilchrist County Sheriff's Department*, and certainly no evidence of any prior incidents involving either Investigator DuBois or Deputy Holt.

In a recent case the United States Supreme Court has discussed the question of whether delegating discretionary decision making power to a subordinate is automatically a delegation to the subordinate of the authority to make policy. The Supreme Court has clearly held that it is not. The case is *City of St. Louis v. Praprotnik*, 485 U.S. ___, 99 L.Ed.2d 107, 108 S.Ct. ___ (1988). In discussing that question, the United States Supreme Court held as follows:

> . . . Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy. It is equally consistent with a presumption that the subordinates are faithfully attempting to comply with the policies that are supposed to guide them. It would be a different

> matter if a series of decision by a subordinate official manifested a "custom or usage" of which the supervisor must have been aware. See *Post*, at ___, 99 L.Ed.2d 131. In both those cases, the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower-ranking official. But the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policy-making authority, especially where (as here) the wrongfulness of the subordinate's decision arises from a retaliatory motive or other unstated rationale. In such circumstances, the purposes of §1983 would not be served by treating a subordinate employee's decision as if it were a reflection of municipal policy.

Id. at 122.

The United States Supreme Court has very recently decided the case of *City of Canton, Ohio v. Harris*, 489 U.S. ___, 103 L.Ed.2d 412, 109 S.Ct. ___ (1989). The plaintiff in that case fell down several times and was incoherent following her arrest by officers of the City of Canton Police Department and they summoned no medical assistance for her. After her release, she was diagnosed as suffering from several emotional ailments requiring hospitalization and subsequent out-patient treatment. Some time later she filed her suit under Section 1983.

The Court set forth the fact that the jury's verdict was based on the following:

> Evidence was presented that indicated that, pursuant to a municipal regulation, shift commanders were authorized to determine, in their sole discretion, whether a detainee required medical care.

* * *

> In addition, testimony also suggested that Canton shift commanders were not provided with any special training (beyond first-aid training) to make a determination as to when to summon medical care for an injured detainee.

103 L.Ed.2d at 422.

The City's policy is described by the United States Supreme Court in *City of Canton, supra,* as follows:

> There can be little doubt that on its face the city's policy regarding medical treatment for detainees is constitutional. The policy states that the City Jailer "shall . . . have [a person needing medical care] taken to a hospital for medical treatment, with permission of his supervisor . . . . " App. 33. It is difficult to see what constitutional guarantees are violated by such a policy.

Id. at 425.

The Supreme Court's holding was as follows:

> We hold today that the inadequacy of police training may serve as the basis for §1983 liability *only where the failure to train amounts to deliberate indifference* to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition in *Monell,* 436 U.S. at 694, and *Polk County v. Dodson,* 454 U.S. 312, 326 (1981), that a municipality can be liable under §1983 only where its policies are the "moving force [behind] the constitutional violation".

Id. at 426 (Emphasis supplied).

In the face of that holding the trial court allowed (over defense objections, Vol III, Trial Transcript, pp. 4-9)

a special interrogatory verdict to be used by the jury including the following question:

> 3. Did the Defendant Sheriff Rodgers establish a custom or policy or was he *grossly negligent* in training or supervising his deputies which proximately caused the deprivation of Plaintiff's constitutional rights?
>
> YES ___ NO ___ (Emphasis supplied)

In its panel decision the Eleventh Circuit disposed of that issue with a single sentence which reads in its entirety:

> The jury decided that Sheriff Rodgers *improperly* trained (or supervised) his deputies and we agree that substantial evidence supported that verdict.

912 F.2d at 1342 (Emphasis supplied).

The special interrogatory verdict and the Eleventh Circuit's ruling on that question not only conflict with but fly in the teeth of this Court's holdings in *City of Canton v. Harris, supra, City of Oklahoma City v. Tuttle, supra,* and *City of St. Louis v. Praprotnik, supra.*

CONCLUSION

The two issues presented by this Petition, the application of Eleventh Amendment immunity to Florida sheriffs in their official capacities, and the standard of proof to establish the existence of a policy or custom arising out of a single incident, are both important issues of state wide importance in the state of Florida. The opinion of the Eleventh Circuit is in direct and irreconcilable conflict with several decisions by this Court. For the reasons set forth above, the Court should grant Petition for Writ of Certiorari and resolve these important issues.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

MARCIA J. HUFFORD, RICHARD A. HUFFORD, and JOSHUA JAMES PENTICOFF, a minor, by and through his Mother and next Friend, MARCIA J. HUFFORD

ROY RODGERS, as Sheriff of Gilchrist County, and THOMAS HOLT, an individual

JUDGMENT IN A CIVIL CASE

(Filed Nov 4 1988)

CASE NUMBER: GCA 85-0187-MMP

[X] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That plaintiff MARCIA J. HUFFORD recover of the defendant ROY A. RODGERS as Sheriff of Gilchrist County the sum of $75,000.00 with interest thereon at the rate of 8.15 per cent as provided by law, and costs of action.

That plaintiff RICHARD A. HUFFORD recover of the defendant ROY A. RODGERS as Sheriff of Gilchrist County the sum of $7,500.00 with interest thereon at the rate of 8.15 per cent as provided by law, and costs of action.

That plaintiff JOSHUA JAMES PENTICOFF recover of the defendant ROY A [sic]. RODGERS as Sheriff of Gilchrist County the sum of $75,000.00 with interest thereon at the rate of

8.15 per cent as provided by law, and costs of action.

November 4, 1988
Date

MARVIN S. WAITS
Clerk

/s/ Sullivan
(By) Deputy Clerk

Marcia J. HUFFORD, Richard A. Hufford, Joshua James Penticoff, a minor, Plaintiffs-Appellees, Cross-Appellants,

v.

Roy RODGERS, as Sheriff of Gilchrist County, and Thomas Holt, an individual, Defendants-Appellants, Cross-Appellees.

No. 88-3994.

United States Court of Appeals,
Eleventh Circuit.

Sept. 25, 1990.

Julis F. Parker, Jr., Keith C. Tischler, Tallahassee, Fla., for defendants-appellants, cross-appellees.

Anthony J. Salzman, Gainesville, Fla., Terrence M. Brown, Starke, Fla., for plaintiffs-appellees, cross-appellants.

Appeal from the United States District Court for the Northern District of Florida.

Before EDMONDSON, Circuit Judge, HILL* and HENDERSON, Senior Circuit Judges.

HILL, Senior Circuit Judge:

The appellants, a Florida sheriff and his deputy, challenge the district court's conclusion that the Eleventh Amendment did not protect them from liability under 42 U.S.C. §1983. The sheriff also contends that substantial evidence did not support a verdict against him in his

---

See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

official capacity, while the original plaintiffs, as cross-appellants, contend that substantial evidence did not support a verdict in favor of the deputy. We affirm.

FACTS

Marcia J. Hufford received a divorce from her first husband, Dennis Lee Penticoff, in April, 1980, and received custody of her minor child, (Joshua James), during the months of the school year. In September, 1980, Ms. Hufford, who had remarried, moved to a new address in Trenton, Florida.

In October, 1981, Penticoff presented the Gilchrist County Sheriff's Department with a photocopy of his Final Judgment and an affidavit executed that month. Penticoff had stapled the affidavit, which bore no indicia of having been filed in any court proceeding, to the Final Judgment. Carrying only these papers, Deputies Thomas Holt and Bud Dubois arrived at the Hufford's home at about 11:30 that evening, and, without notice, permission or consent, entered the Hufford's home and demanded that the Huffords relinquish Joshua James pursuant to their alleged court order.

Ms. Hufford advised the deputies that the papers they were brandishing were merely her divorce decree, rather than a court order, and that she had legal custody of her child; she then demanded that the deputies contact the sheriff to straighten the matter out. Mr. and Ms. Hufford both testified that Deputy Dubois informed them that Sheriff Rodgers "knew all about this," and then ordered her to relinquish her son, so that they could transfer him to his father's custody. Sheriff Rodgers,

however, denied any prior knowledge of the events of that evening.

Both Mr. and Mrs. Hufford also testified that Deputy Dubois threatened them with jail, and that both deputies raised their flashlights in a threatening manner. Deputy Holt, on the other hand, testified that he could not recall any conversation or threats, and Deputy Dubois died before the Huffords initiated this lawsuit.

Later that night, the deputies gave Joshua James Penticoff to Dennis Penticoff at the sheriff's office. Penticoff ultimately fled to Texas with his three-and-a-half year old son, where Ms. Hufford located him after a fifteen month search. The court later granted Ms. Hufford sole and exclusive custody of her son, subject to limited visitation with Penticoff.

PROCEEDINGS IN THE DISTRICT COURT

In October, 1985, the Huffords filed a Complaint in the District Court for the Northern District of Florida, alleging that both Sheriff Rodgers and Deputy Holt had seized Joshua in violation of the Civil Rights Act, 42 U.S.C. §1983. Deputy Holt died during the pendency of this action, and counsel substituted his estate as a party defendant.

After a jury trial, the jury returned a verdict against Sheriff Rodgers only, and the district court entered a judgment on the verdict on November 4, 1988. This appeal followed.

DISCUSSION

Appellants now challenge the district court's conclusion that the Eleventh Amendment does not immunize Sheriff Rodgers, (sued only in his official capacity), from liability in this matter. They also contend that substantial evidence did not support the jury's verdict against Sheriff Rodgers. Appellees, on the other hand, as cross-appellants, contend that substantial evidence did not support the jury's verdict in favor of Deputy Holt.

A. Eleventh Amendment Immunity

Appellants vigorously contend that the Eleventh Amendment protects Sheriff Rodgers from liability under Section 1983. It does not. The question of Eleventh Amendment immunity apparently remains integrally confused with the related, but distinct, concept of state sovereign immunity; we thus begin by untangling the case law, in order to provide guidance both to ourselves and to parties who litigate these issues in the future.

"[T]he Eleventh Amendment deals only with federal jurisdiction to hear suits against the state, not with the state's immunity from suit in any forum." *Bartlett v. Bowen*, 816 F.2d 695, 710 (D.C.Cir. 1987). The Eleventh Amendment insulates " . . . private parties seeking to impose a liability [in federal court] which must be paid from public funds in the state treasury. . . . " *Edleman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662 (1974). State sovereign immunity, on the other hand, serves to insulate states from lawsuits in their own courts. *See e.g., Hill v. Dept. of Corrections*, 513 So.2d 129, 131-33 (Fla.1987), *cert. denied*, 484 U.S. 1064, 108 S.Ct.

1024, 98 L.Ed.2d 989 (1988). State sovereign immunity may protect Sheriff Rodgers from state claims in state court; *state* immunity, however, has no application to claims, in federal court, under Section 1983.[1]

The Eleventh Amendment bars suits in federal court against *state* agencies "when the action is in essence one for the recovery of money from the state. . . ." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945). We must therefore determine whether Sheriff Rodgers is an agent of the state (in which case the Eleventh Amendment protects him), or of the county, (in which case it does not). We conclude, as have prior panels of this circuit, that a Florida sheriff is a county official.

In *Tuveson v. Florida Governor's Counsel on Indian Affairs*, 734 F.2d 730, 732 (11th Cir. 984 [sic]), we noted that when the Supreme Court determines which political entities the Eleventh Amendment protects, it gives "special attention to the state law creating and defining the entity." We also noted four aspects of state law that we consider especially pertinent to the issue: "how state law defines the entity, what degree of control the state maintains over the entity, where funds for the entity are

---

[1] The Supreme Court recently clarified that, even in state court, local entities subject to suit from federal claims to the same extent as they would be in federal court. In other words, when parties raise *federal* claims (at least, under Section 1983), then federal law must determine whether particular governmental entities are subject to suit. *Howlett v. Rose*, ___ U.S. ___, 110 S.Ct. 2430, 2442, 110 L.Ed.2d 332 (1990).

derived, and who is responsible for judgment against the entity." *Id.* at 732.

A. *State Law.* As we noted in *Lundgren v. McDaniel*, 814 F.2d 600, 605 n. 4 (11th Cir.1987), the "Florida Constitution indicates that a sheriff is a county officer." That Constitution states:

> (d) COUNTY OFFICERS. There shall be elected by the electors of each county, for terms of four years, a *sheriff*, a tax collector, a property appraiser, a supervisor of elections and a clerk of the circuit court.

Fla. Const., Art. VIII, §1(d) (emphasis supplied). The Florida Supreme Court, moreover, in *Beard v. Hambrick*, 396 So.2d 708, 711-712 (Fla.1981), held that the Florida Constitution established that "a sheriff is a 'county official' and, as such, is an integral part of the county';" that court also concluded, however, that for state sovereign immunity purposes, "the sheriff is an official of a political subdivision of the state."[2]

B. *State Control.* Although state laws of general application govern Florida sheriffs, their guidance does not necessarily transform the sheriff's office into an agency of the state. *See Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 281, 97 S.Ct. 568, 573, 50 L.Ed.2d 471 (1977). In Florida, moreover, particular statutes specifically permit sheriffs to control the day-to-day operations

---

[2] We note parenthetically that after *Howlett v. Rose*, ___ U.S. ___, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990), a Florida court's designation of county sheriffs as "political subdivision[s] of the state" will have effect only in cases involving *state* claims in state court.

of their office. *See e.g.*, §30.53, Fla.Stat. (1987) (statute preserves the independence of sheriffs in matters "concerning the purchase of supplies and equipment, selection of personnel, and the hiring, firing and setting of salaries of such personnel"); §951.061, Fla.Stat. (1987) (county may designate the sheriff as the chief correctional officer for the county correctional system). We discern in these statutes no intent for state officials to control or supervise the sheriff.

C. *Funding Source.* County taxes fund the sheriff's budget, which the county pays in monthly installments. Any excess at the year's end returns to the county. *See* §§30.49, 30.50, Fla.Stat. (1987). The county also pays the sheriff's salary. *See* §30.50, Fla.Stat. (1987). While the state provides an appeals process, it does not attempt to fund the sheriff's activities. *See* §30.49, Fla.Stat. (1987).

D. *Funds to Satisfy Judgment.* We note here that no provision of Florida law provides state funds to a Florida sheriff to satisfy a judgment against the sheriff, either in his official or individual capacity. Sheriff Rodgers, in fact, is insured through monies appropriated to him by the Gilchrist County Commission, as part of a self-insurance fund established by sheriffs of the state of Florida. We have often stressed that the Eleventh Amendment is unlikely to protect an entity with "fiscal autonomy." *Fincher v. State of Florida Dept. of Labor and Employment Security*, 798 F.2d 1371 (11th Cir.1986), *cert. den.* 479 U.S. 1072, 107 S.Ct. 1262, 94 L.Ed.2d 124 (1987). We are satisfied that the parties here could not invoke the state of Florida to pay any judgment on behalf of Sheriff Rodgers.

From this analysis, we conclude that Sheriff Rodgers acted as a county, rather than a state, official. Both parties to this action, however, refer us to Section 768.28(15), Fla.Stat. The state of Florida waived its state sovereign immunity through the enactment of Section 768.28, but added subsection 15 in 1985 in order to exclude federal court actions:

> No provision of this section, or of any other section of the Florida statutes . . . shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the United States . . .

Appellees assure us that this section has no application to the question at issue here, since, as we have noted, the Florida legislature enacted the passage in 1985, while the instant action accrued in 1981. Every state, of course, has the option of retaining its Eleventh Amendment immunity or of eliminating it by waiver. In this case, however, the quoted passage is simply irrelevant to the issues we evaluate today. By previous act, the Florida legislature had intentionally waived its sovereign immunity; the quoted amendment reflects only its care *not* to waive, by accident, its Eleventh Amendment immunity as part of the same legislation.

At any rate, since sheriffs in Florida act only on behalf of the counties they serve, we hold that the Eleventh Amendment does not protect Florida sheriffs from liability under section 1983. In so doing, we reaffirm our holdings in *Lucas v. O'Loughlin*, 831 F.2d 232, 235 (11th Cir.1987), *cert. den. sub. nom. St. Johns County v. Lucas*, 485 U.S. 1035, 108 S.Ct. 1595, 99 L.Ed.2d 909 (1988) and

Lundgren v. McDaniel, 814 F.2d 600, 605 n.4 (11th Cir.1987).

B. Substantial Evidence and the Verdicts Against Sheriff Rodgers and Deputy Holt

The jury decided that Sheriff Rodgers improperly trained (or supervised) his deputies, and we agree that substantial, evidence supported that verdict. We also, agree that ample evidence supported the jury's verdict that Deputy Holt acted in good faith, in light of clearly established law and the information that he possessed at the time. We have never required law enforcement officers, detailed to accompany their seniors at the service of warrants to discount their seniors' assurances, and demand the right to individual inspection and evaluation of warrants, supporting affidavits, and other papers, before obeying those seniors' instructions.

CONCLUSION

We therefore AFFIRM the judgment of the district court. AFFIRMED.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-3994

MARCIA J. HUFFORD,
RICHARD A. HUFFORD,
JOSHUA JAMES PENTICOFF, a minor,

Plaintiffs-Appellees,
Cross Appellant,

versus,

ROY RODGERS, as Sheriff of Gilchrist County, and THOMAS HOLT, an individual,

Defendants-Appellants/
Cross-Appellee.

On Appeal from the United States District Court
for the NORTHERN DISTRICT OF FLORIDA

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion SEPTEMBER 25, 1990, 11th Cir., 19 ___, ___F.2d___).

(Filed Dec. 12, 1990)

Before: EDMONDSON, Circuit Judge, HILL* and HENDERSON, Senior Circuit Judges.

---

*See Rule 34-2(b), Rules of the U.S. Court of Appeal for the Eleventh circuit.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
FEB 20 1991
OFFICE OF THE CLERK

(2)

No. 90-1148

In The

Supreme Court of the United States

October Term, 1990

ROY RODGERS, as Sheriff of Gilchrist County, Florida,

Petitioner,

vs.

MARCIA J. HUFFORD, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. COURSE OF THE PROCEEDINGS IN THE COURT BELOW

Respondents' filed a Complaint on October 23, 1985 asserting federal and state law claims. (R1-1) Defendants filed a Motion to Dismiss on December 5, 1985 (R1-5) which was denied by Order dated January 10, 1986. (R1-9)

Defendants filed their Answer and Affirmative Defenses on January 27, 1986. (R1-10) On August 13, 1986 Defendants filed a Motion for Summary Judgment which was denied by Order dated February 24, 1987. (R1-34)

During the pendency of this action Defendant Deputy Thomas Holt died. On April 21, 1987 a Suggestion of Death was filed on the record. (R1-39) Defendant Holt's estate was substituted as a party Defendant and an Answer filed on May 17, 1988. (R1-51)

Following discovery, the case came to trial before a jury in Gainesville, Florida beginning on October 31, 1988. On November 2, 1988, the jury returned a verdict in favor of Plaintiffs against Sheriff Rodgers. (R2-76) A Judgment on the verdict was entered November 4, 1988. (R2-77) Defense Motions for Judgment in accordance with their Motion for Directed Verdict or, in the alternative, for a new trial, were filed on November 14, 1988 (R2-79) and denied by Order dated November 29, 1988. (R2-82) This appeal followed. After oral arguments on March 29, 1990 the Eleventh Circuit filed an Opinion on September 25, 1990 affirming the District Court. (App. 3-11) Defendants' Petition for Rehearing and Suggestion of Rehearing en banc, were denied on December 12, 1990. (App. 13)

B. STATEMENT OF THE FACTS

Marcia Hufford and Dennis Lee Penticoff were divorced in Leon County, Florida on April 22, 1980. (R1-1) Marcia Penticoff Hufford was living in Clearwater, Florida at that time. (R-4-95-52, Trial Transcripts Vol. I) Marcia Hufford was awarded custody of their only child, Joshua James Penticoff, during the school year. (R1-1, R4-95-53, Trial Transcripts Vol. II)

Dennis Penticoff ceased contact with Joshua in June 1980. (R4-95-4, Trial Transcripts Vol. I) The Huffords and Joshua moved to Trenton, Florida in October 1980, leaving forwarding information in Clearwater. (R4-95-5, 6, 42, Trial Transcripts Vol. II)

On October 23, 1981 Dennis Lee Penticoff presented the Gilchrist County Sheriff's Department with a photocopy of his final judgment of divorce and an affidavit. (R4-95-14, 52, Trial Transcripts Vol. II) Contrary to Petitioner's statement, the affidavit bore no indicia of having been filed in any court proceeding. (R4-95-14, Trial Transcripts Vol. II) Deputies Holt and Dubois went to the Hufford's home at 11:30 p.m. that Sunday evening and without notice, permission, or consent, entered the house and demanded that the Huffords' turn over three year old Joshua (R3-94-33, 60, 61, 62, 63, 64, R4-95-11, Trial Transcripts Vols. II and III).

Marcia Hufford told the deputies that there was no Court order; that she had legal custody of Joshua and asked them to contact the Sheriff to straighten the matter out. (R4-95-11-12, Trial Transcripts Vol. II) Deputy Dubois told Marcia Hufford that the sheriff "knew all about this." (R4-95-12, Trial Transcripts Vol. II) Deputy Holt did not

contradict this statement and told Richard Hufford that they were following Sheriff Rodger's orders. (R3-94-35, 36, Trial Transcripts Vol. I).

The Huffords testified that they were threatened with jail by the deputies and that both of the officers brandished their flashlights in a threatening manner. (R3-94-34; R4-95-50, Trial Transcripts Vols. II and III) Deputy Holt could not recall any threats or conversation for that matter. (R3-94-60, 61, 62, 63, 64, 65, Trial Transcripts Vol. I)

Approximately eight weeks after the incident, Deputy Holt apologized to Mrs. Hufford for the incident; advised her that he knew what they were doing was wrong; and that if it had been left up to him, the incident would have never occurred. (R3-94-21, Trial Transcripts Vol. I)

Consistent with his apology, Deputy Holt later testified that he had been specifically trained and instructed to follow a superior's orders, even where it required him to knowingly perform an unlawful or illegal act. (R3-94-58, 59, Trial Transcripts Vol. I).

After obtaining Joshua from the deputies, Dennis Penticoff stayed in Clearwater, Florida for six weeks and then fled to Texas. (R4-95-24, Trial Transcripts Vol. II) After fifteen months, Marcia Hufford located Joshua in Texas in late January, 1983. The Florida Court granted sole and exclusive custody of Joshua Penticoff to Marcia Hufford, subject to limited visitation with Dennis Penticoff. Contrary to Petitioner's assertions, no Court Order was entered reflecting any agreement of the parties. (In Re: *Penticoff v. Penticoff*, Now Case No.: 88-36-CA,

Eighth Judicial Circuit, in and for Gilchrist County, Florida)

SUMMARY OF ARGUMENT

In Florida, county sheriffs are officials of the counties they serve and are thus "persons" not entitled to Eleventh Amendment Immunity. The Eleventh Circuit analyzed the role of sheriffs in Florida, including the crucial factor of state liability for monetary awards and correctly concluded, in conformity with this Court's rulings, that sheriffs are arms of the counties.

This Court should not consider Petitioner's second question presented. Sheriff Rodgers did not raise the issue of the jury verdict form on appeal, nor is there a clear objection in the record. The question submitted to the jury conforms to the "deliberate choice" standard formally adopted by this Court. Substantial evidence supported the jury's determination that Sheriff Rodgers instigated and maintained the policies and procedures for his deputies which directly led to the violation of Respondents' civil rights.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURT CORRECTLY DECIDED THAT COUNTY SHERIFFS ARE COUNTY OFFICIALS AND THUS "PERSONS" FOR PURPOSES OF 42 U.S.C. §1983 ACTIONS, AND THAT ELEVENTH AMENDMENT IMMUNITY IS IRRELEVANT IN THIS CASE.

This Court has long ruled that Eleventh Amendment Immunity does not extend to counties or municipal

corporations. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977). The criteria of determining whether an entity is a "state agency" or a county or municipal corporation is equally well established. The focus of the inquiry is whether a judgment would have to be paid from public funds of the state treasury. *Edelman v. Jordan*, 415 U.S. 651 (1974), 94 S.Ct. 1347, 39 L.Ed. 2d 662. Four other factors that bear on this determination are how state law applies to the entity; what control the state maintains over the entity; where funds from the entity are derived; and how the entity is treated by state courts. See *Fouche v. Jekyll Island-State Park Authority*, 713 F.2d 1518 (11th Cir. 1983); *Fincher v. State of Florida Department of Labor*, 798 F.2d 1371 (11th Cir. 1986); *Tuveson v. Florida Governor's Council on Indian Affairs, Inc.*, 734 F.2d 730 (11th Cir. 1984).

After analyzing the role of county sheriffs in Florida under this factually intensive criteria, the panel decision correctly held that in Florida, county sheriffs are county officials and not officers of the State. Thus, county sheriffs are not entitled to Eleventh Amendment Immunity. This decision is totally consistent with the prior decisions of the Eleventh Circuit and Fifth Circuit Courts of Appeal. *Lundgren v. McDaniel*, 814 F. 2d 600 (11th Cir. 1987); *Lucas v. O'Loughlin*, 831 F.2d 232 (11th Cir. 1987); *Barts v. Joyner*, 865 F.2d 1187 (11th Cir. 1989); *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980).

Similarly, this decision is also consistent with Florida State Court rulings that counties are not entitled to Eleventh Amendment Immunity, *Elder v. Highlands County Board of County Commissioners*, 497 So.2d 1334 (Fla.

2nd D.C.A. 1986) and that sheriffs are county officials. *Beard v. Hambrick*, 396 So.2d 708 (Fla. 1981)

It is critical to note that the Petitioner does not contend that any portion of this award is likely to be paid by state revenues. Neither the State of Florida, nor any of its agencies is responsible for the debts of county sheriffs. Section 30.49, 30.50 *Florida Statutes*. In Florida, all judgments are paid by the county commission with county revenues if there is no insurance. In this particular case, the claim will be paid by a self-insurance fund and insurance purchased by county revenues.

In determining that county sheriffs are the type of local governmental entities contemplated in *Monell v. N.Y. City Dept. of Social Services*, 436 U.S. 658, 663, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978), the Eleventh Circuit naturally analyzed the Constitution and Statutes of Florida, the control of county sheriffs by the state government and the fiscal responsibility of the state to satisfy judgments.

Florida State Law sets forth the general duties of all county officials including county commissions, county school boards and county sheriffs. (Florida Statutes Chapters 125, 230, and 30 respectively). The salaries of county officials including sheriffs, county commissioners, and county clerks are set forth in Florida Statutes Chapter 145.

Likewise, the inclusion of sheriffs under *local government*, "County Officers", in the Florida Constitution is no random designation as Petitioner would suggest.[1] The

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[1] See, *Madison v. Gerstein*, 440 F.2d 338 (5th Cir. 1971). A Florida "Sheriff" is a department head within the executive arm of the local government. *Id.* at p. 342

electors of a county may abolish the office of sheriff (along with other county offices) by referendum. Florida Constitution, Article VIII, §1(d), Section 30.53, Florida Statutes guarantees the autonomy of county sheriffs:

> **30.53 Independence of constitutional officials. – The independence of the sheriffs shall be preserved concerning the purchase of supplies and equipment, selection of personnel, and the hiring, firing, and setting of salaries of such personnel; provided that nothing herein contained shall restrict the establishment or operation of any civil service system or civil board created pursuant to s. 14, Art. III, of the Constitution of Florida, provided further that nothing contained in ss. 30.48-30.53 shall be construed to alter, modify or change in any manner any civil service system or board, state or local, now in existence or hereafter established.**

Florida state courts have also consistently ruled that county sheriffs are "county officials". As stated by the Florida State Supreme Court:

> "We find that a sheriff is a "county official", and as such is an integral part of the "county" as a "political subdivision" . . . " *Beard v. Hambrick*, 396 So.2d 708 (Fla. 1981)

In reaching its decision, the Florida Supreme Court stated, "The provisions of the Florida Constitution appear to clearly mandate this answer." *Id.* at p. 711. The Court then went on to state, "In our opinion, there is no reasonable way to construe Article VIII, Section 1, other than to include sheriffs as well as other named county officials as part of a county. . . . " *Id.* at p. 711.[2]

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[2] Even at common law prior to adoption of the 1968 Constitution, county sheriffs were not state officials. State officials

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Far from creating a question as to the status of Florida sheriffs, the panel decision removed any doubt for future litigants. Prior to the panel's decision, the District Courts in Florida had briefly split on this issue. The cause of the inconsistencies within the lower courts was an overbroad interpretation of the Eleventh Circuit's ruling in *Gamble v. Florida Dept. of Health and Rehabilitative Services*, 779 F. 2d 1509 (11th Cir. 1986) and its application in *Hill v. Department of Corrections*, 513 So.2d 129 (S. Ct. Fla. 1987). The lower Courts' confusion after *Gamble* has now been remedied by this Court's ruling in *Howlett v. Rose*, ___ U.S. ___, 110 S.Ct. 2430, ___ L.Ed. 2d___ (1990).

Petitioner's reliance upon Alabama and South Carolina cases is equally misplaced. In the Alabama and South Carolina cases, the Eleventh Circuit utilized the exact same factual analysis to correctly conclude that sheriffs were "state officials" for Eleventh Amendment Immunity purposes. This difference in results is because in Alabama and South Carolina any judgments are paid out of state treasury funds and because their sheriffs are state officers under their respective state constitutions.

The governing criteria of financial responsibility on the part of the state separates Florida sheriffs from Alabama sheriffs. The Eleventh Circuit concluded in *Parker v. Williams, supra*, "If we could say with a "virtual certainty" that the damages would be paid from county and not

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enjoyed sovereign immunity at common law while sheriffs did not. *Swenson v. Cahoon*, 152 So. 203 (Fla.S.Ct. 1933).

from state funds, our holding might be different," at 767 N. 2.

In the instant case, it is *certain* that the judgment against Sheriff Rodgers will *not* be paid with one penny of state funds. Sheriff Rodgers is part of a self insurance program for county sheriffs paid by county funds and carries excess liability insurance paid for with county monies.

The Eleventh Circuit in *Parker v. Williams*, 855 F. 2d 763, 766-767 N. 2 (11th Cir. 1988) and *Free v. Granger*, 887 So. 2d 1552 (11th Cir. 1989), both Alabama cases, relied upon the definition of sheriffs as state officers set forth in the Alabama Constitution. This crucial distinction between Alabama and Florida is not a question of semantics, but is one of the specific criteria that a Court is required to consider. While sheriffs are constitutional *state officials* in Alabama and South Carolina, county sheriffs are *county officials* under the Florida and Georgia State Constitutions. Georgia Constitution, Article IX, §1 #3.

County sheriffs in Florida are county officials under all criteria previously articulated by this Court. For this Court to now conclude otherwise would be to effectively extend Eleventh Amendment Immunity to all county officials and even municipalities.

II. PETITIONER HAS WAIVED ANY OBJECTIONS TO THE VERDICT FORM USED IN THE TRIAL COURT.

The Eleventh Circuit found that substantial evidence supported the jury's verdict that Sheriff Rodgers improperly trained (and/or supervised) his deputies. Petitioner

now seeks to object to the verdict form submitted at trial when he did not raise this issue on appeal before the Eleventh Circuit. Respondents submit that Petitioner has now waived his objection as to the propriety of the verdict form.

The record is ambiguous as to Petitioner's actual position on this issue at trial. At one point, counsel for Petitioner objected to the verdict form, but later reached agreement with the form used. (R5-4-9, 15, Trial Transcripts, Vol. III.) On appeal to the Eleventh Circuit Petitioner addressed only the sufficiency of the evidence to support the jury's verdict.

III. A WRIT OF CERTIORARI IS NOT JUSTIFIED BY PETITIONER'S ARGUMENTS.

The Eleventh Circuit's decision was limited to the facts of the case at bar and has no precedential value on any substantive 42 U.S.C. §1983 issues. The Eleventh Circuit did not redefine the limits of governmental liability but affirmed the issue without detailed comment. The appropriate forum for a review of the panel's decision would be en banc consideration. Petitioner filed a Motion for Rehearing and Suggestion of Rehearing en banc which were both denied without a poll. (Appendix, page 13).

Petitioner is, in effect, requesting this Court to review for a second time the trial court below, even though the Eleventh Circuit's decision at bar presents no novel or important questions which warrant a writ of certiorari. To grant the Writ in this case would open the floodgates for countless other petitioners to request "super appellate"

consideration. Petitioner's dissatisfaction with the brevity of the Eleventh Circuit's opinion does not merit this Court's consideration.

IV. THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH PRIOR HOLDINGS OF THIS COURT AND IS SUPPORTED BY THE EVIDENCE.

After *Monell*, it is clear that counties and county officials can be held liable under 42 U.S.C. §1983 where the execution of the government's policy or custom inflicts the injury. In the instant case, the jury had three (3) independent grounds or basis to answer "yes" to question 3 of the verdict form.

There was clear and convincing evidence that the lack of police training, lack of proper policies, and lack of written procedures in the Gilchrist County Sheriff Department was so obvious and the inadequacy so likely to result in a violation of constitutional rights, as to amount to a "deliberate choice" within the purview of *City of Oklahoma v. Tuttle*, 471 U.S. 808, 85 L.Ed. 2d 79, 105 S.Ct. 2427 (1985), and *City of Canton, Ohio v. Harris*, 489 U.S. ___, 103 L.Ed. 2d 412, 109 S.Ct. ___ (1989).[3]

The unrefuted expert testimony at trial was that Deputy Holt was not properly trained even though appropriate training was readily available; that the Petitioner did not have necessary written policies and procedures on

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[3] It should be noted that Judge Paul's jury instruction in 1988 virtually tracked the language used by this Court in *Canton* verbatim.

numerous matters which he should have; and that the policies of the Petitioner were not consistent with proper police procedures. (R3-94-120, 127-128, Trial Transcripts Vol. I) Defendant Thomas Holt testified as to the express policy of Sheriff Rodgers:

> Q. If he asks you to do an unlawful or illegal act would you refuse to obey that order of command?
>
> A. I was told to do what my supervisor told me to do and if there was something wrong with it, my sheriff would take care of it. (R3-94-59, Trial Transcripts Vol. I)

Rather than properly training and supervising his officers, the Petitioner established an official policy wherein his authority as sheriff surplanted obedience and respect for the law. His deputies were specifically trained and instructed to follow a supervisor's order even where it required them to knowingly perform an unlawful or illegal act. (R3-94-59)[4] At no time did Petitioner ever deny that this was his formal or official policy.

The verdict form objected to by Petitioner required the jury to find a causal link between the Sheriff's policy and the wrongful acts of his deputies. *City of Oklahoma v. Tuttle, supra* at 823. As a direct and proximate cause of Petitioner's official policies, the deputies illegally entered

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[4] Deputy Holt incredibly testified 5 years later that he followed proper procedures on the night of October 23, 1981. (R3-94-79, Trial Transcripts Vol. I) In finding that Deputy Holt acted in good faith, the trial jury concluded that this was in fact the Petitioner's official policy and that Deputy Holt was acting in accordance with that policy when he committed the improper acts complained of.

into Respondent's home; refused to leave when asked to do so; refused to examine the photocopy and affidavit, or contact others when advised that their actions were illegal; and illegally seized and took into custody a three-year-old child without lawful authority.

There was also substantial, competent evidence that Sheriff Rodgers had actual prior knowledge of his deputies actions and approved them in advance.[5]

CONCLUSION

Petitioner's request for a Writ of Certiorari should be denied. The Eleventh Circuit's decision was consistent with the criteria set forth by this Court to determine "state agency" for 42 U.S.C. §1983 purposes. The decision at bar logically follows prior Eleventh Circuit and Florida State Court rulings on the status of Florida sheriffs as county officials.

This Court should not consider the second question presented by Petitioner. The record is ambiguous as to Petitioner's objection in the trial court and the issue was not raised in the Eleventh Circuit. Furthermore, the verdict form used conforms to the controlling case law

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[5] Documentary evidence which could have corroborated Petitioner's prior involvement or knowledge of this matter was not available at trial as the official complaint file was conveniently lost by the Petitioner and the radio log was destroyed. (R3-94-69, 70, 91-92, 104-105, Trial Transcripts Vol. I)

handed down by this Court and substantial evidence supported the jury's decision. Petitioner has set forth no justification for the Writ.

Respectfully Submitted,

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